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Moral Ambition

THE SERMONS OF HARRY A. BLACKMUN

Dena S. Davis[†]

I. INTRODUCTION

Justice Harry A. Blackmun died on March 4, 1999 at the age of ninety. The public funeral was held on March 9, at the huge and impressive Metropolitan Memorial United Methodist Church, on Nebraska Avenue in Washington, D.C. Among the many speakers at this “Service of Death and Resurrection” was the Reverend Dr. William A. Holmes, senior pastor at the Church, speaking on “The Churchmanship of Harry Blackmun.”¹ Dr. Holmes talked movingly of a man who was intimately involved in the affairs of his church. Among the Justice’s many contributions, Holmes noted a sermon that Blackmun had once preached on the *Book of Ruth*. Dr. Holmes concluded his eulogy by remarking that Justice Blackmun’s theory of Constitutional interpretation was the same as his theory of biblical interpretation: a theory grounded in compassion.

On March 4, 2004 the Justice’s papers became available to the public through the Library of Congress.² In addition to the sermon on the *Book of Ruth*, preached in 1992, there was an earlier sermon, preached in 1987, on the bicentennial of the

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¹ Funeral program: Harry Andrew Blackmun, Nov. 12, 1908-Mar. 4, 1999 (Metropolitan Memorial United Methodist Church, Washington D.C., Mar. 9, 1999) (on file with author).

² *News from the Library of Congress: Papers of Supreme Court Justice Harry A. Blackmun Opened for Research at Library of Congress*, Mar. 4, 2004, <http://www.loc.gov/today/pr/2004/04-041.html>. A description of the papers, a finding aid, and much more, is available at <http://www.loc.gov/rr/mss/blackmun/>.

Constitution.³ In this essay I will describe how these sermons connect to and illuminate the Justice's jurisprudence. As I show below, recent scholarship has focused on the parallels and similarities between Constitutional and biblical interpretation. After exploring this relationship, I will describe Blackmun's religious upbringing and interests. Next I will summarize the two sermons. Justice Blackmun's sermon on the *Book of Ruth* will be more heavily discussed because of its prominent themes of love and compassion, and will be broken down into subsections relating to women and social justice. Then I will show how the sermons relate to each other, and to one of the Justice's most famous opinions: his dissent in *DeShaney v. Winnebago County Department of Social Services*.⁴

One might ask why the sermons of a sitting Justice would be thought to shed any light at all on his jurisprudence, especially in a Justice who, like Blackmun, was careful of the boundaries between church and state.⁵ In this essay, I take seriously Dr. Holmes's closing comment and I ask: *How similar was Blackmun's interpretive approach to the Constitution and to the Bible?*

II. CONSTITUTIONAL AND BIBLICAL INTERPRETATION

In the 1980s, scholars of constitutional interpretation rediscovered that the Constitution is indeed a *text*, and that they could learn from other scholars who engage in textual analysis and say something about the relation between text and reader.⁶ Originally, most of the excitement focused on literary criticism, but in fact the parallels between Constitutional and biblical interpretation are both more obvious and more interesting. To quote Michael Perry:

³ This material is located in Container 1462, folders 2 & 3, Harry A. Blackmun Papers, Manuscript Division, Library of Congress (photocopies on file with author). There are two copies of "In Recognition of the Imperfect" and one of "Mother's Day." All three manuscripts have handwritten emendations, not all of which are legible. Some typewritten words are crossed out or bracketed, sometimes with handwritten changes. In all cases, I have gone with the most plausible final version.

⁴ 489 U.S. 189 (1989).

⁵ Mark C. Rahdert, *A Jurisprudence of Hope: Justice Blackmun and the Freedom of Religion*, 22 *HAMLIN L. REV.* 1, 142 (1998).

⁶ See Stanley Fish, *Working on the Chain Gang: Interpretation in Law and Literature*, 60 *TEX. L. REV.* 551 (1982); Stanley Fish, *Wrong Again*, 62 *TEX. L. REV.* 299 (1983); Ronald R. Garet, *Comparative Normative Hermeneutics: Scripture, Literature, Constitution*, 58 *S. CAL. L. REV.* 35 (1985).

[T]he sacred-text analogy is better than the literary-text one. The relationship between a political community (and tradition) and its foundational text is much more like the relationship between a religious community (and tradition) and its sacred text than the relationship between an “interpretive community” . . . and whatever literary texts happen to engage it. An interpretive community doesn’t often approach (read) a literary text with questions as to what the central aspirations of its tradition are or how to fulfill them. . . . But, of course, both religious and political communities approach their foundational texts with questions of just that sort.⁷

In both the Constitution and the Bible, the text is a foundational document that fulfills both a real and a symbolic role in the society that forms around it; in both cases, members of that community identify themselves (although probably not exclusively) in terms of their relation to the text. “Bible-believing Christians” and “Four-Square Gospel Churches” base their claim to authenticity on their “pure” relation to the text, and even the most quiet and privately religious Jew or Christian must in some way claim an identity or sense of direction in which the Bible provides the compass. In the same way, to be an American citizen, even one who has spent one’s entire life abroad, is to agree to uphold the Constitution, and to imagine oneself as moving always under an invisible umbrella of rights that are guaranteed by it. Most importantly, both the Bible and the Constitution purport to give direction, to have something to say about the behavior of their communities of interpretation.⁸ They are both very public documents, although they play a role in intensely private experiences. For example, a reader who discovers a new interpretation of some phrase in the Bible or the Constitution is *prima facie* impelled to change her behavior accordingly and to try to persuade others to do the same.⁹ Thus, there are important connections between biblical and Constitutional interpretation; connections that can be mined to further our understanding of Justice Blackmun’s thoughts.

⁷ Michael J. Perry, *The Authority of Text, Tradition, and Reason: A Theory of Constitutional “Interpretation,”* 58 S. CAL. L. REV. 551, 561-62 (1985).

⁸ Garet, *supra* note 6, at 62. For the general idea of the authority of interpretive communities, see STANLEY FISH, *IS THERE A TEXT IN THIS CLASS?* (1980).

⁹ Perry, *supra* note 7, at 562.

III. JUSTICE BLACKMUN AND RELIGION

Harry Blackmun was raised in a Methodist family. His parents had met in a small Methodist college in Warrenton, Missouri.¹⁰ During an interview with Bill Moyers late in his life, Blackmun reminisced about growing up in “a very lower middle-class neighborhood in St. Paul, Minnesota. We didn’t have anything . . . I think those things tend to make one what he is in later life, to a degree.”¹¹ He recalled his household as observing the Sabbath, but not in a strict fashion,¹² and remembered that his first meeting with lifelong friend Warren Burger was at age five or six in Sunday School.¹³ Blackmun’s father taught adult education in the local church.¹⁴

During his tenure as Supreme Court Justice, Blackmun was a committed member and regular churchgoer at Metropolitan Methodist United Church (MMUC) in Washington, D.C. He frequently served as a lay reader of the Scripture.¹⁵ He and Mrs. Blackmun usually arrived early, in time to take part in the coffee hour that preceded the service. Many young lawyers and law students attended MMUC and enjoyed the opportunity to chat with the Blackmun couple.¹⁶ The Justice also had a warm relationship with Wesley Theological Seminary in Washington, D.C. He occasionally gave talks there, and frequently played host in his chambers to visiting classes from the Seminary’s National Capital Semester,¹⁷ and to ethics classes taught by Professor Philip Wogamon.¹⁸ Wogamon, who attended MMUC from 1973 to

¹⁰ LINDA GREENHOUSE, *BECOMING JUSTICE BLACKMUN: HARRY BLACKMUN’S SUPREME COURT JOURNEY 2* (2005).

¹¹ *In Search of the Constitution with Bill Moyers: Mr. Justice Blackmun* (PBS television broadcast, 1987). It is interesting that the public did not always perceive the Justice in the same way. See Jon R. Waltz, *The Burger/Blackmun Court*, N.Y. TIMES, Dec. 6, 1970, (Magazine), at 61 (describing Blackmun as a “White Anglo-Saxon Protestant Republican Rotarian Harvard Man from the Suburbs”).

¹² The Justice Harry A. Blackmun Oral History Project: Interviews with Justice Blackmun, conducted by Professor Harold Hongju Koh, Yale Law School, July 6, 1994-Dec. 13, 1995, at 48, available at <http://lcweb2.loc.gov/cocoon/blackmun-public/page.html?FOLDERID=D0901&SERIESID=D09> [hereinafter Oral History].

¹³ *Id.* at 49.

¹⁴ *Id.* at 53.

¹⁵ Telephone Interview with Alan Geyer (Aug. 9, 2005) [hereinafter Geyer Interview].

¹⁶ Telephone Interview with the Reverend Dr. William A. Holmes, pastor emeritus, Metropolitan Methodist United Church (Aug. 1, 2005) [hereinafter Holmes Interview].

¹⁷ Geyer Interview, *supra* note 15.

¹⁸ Telephone Interview with Philip Wogamon (Mar. 29, 2006).

1992, and was Dean at Wesley Theological Seminary from 1972 to 1983, described Blackmun as “quiet, never bombastic, the quintessential gentleman lawyer,” and said that Blackmun often expressed “hurt” about the abuse he experienced as a result of his opining in *Roe v. Wade*.¹⁹

Justice Blackmun’s interest in religion extended well beyond Christianity. At his funeral, Pamela Karlan recalled a Passover seder in 1985, the year she was Blackmun’s clerk. Blackmun, discovering that his clerks were practicing Jews, had “wistfully” mentioned how much he would like to go to a seder. Karlan and a co-clerk, realizing that everyone at the Court was too busy to go home for the holiday, invited other Jewish clerks, spouses and companions, and the Justice, who “seemed enchanted with the invitation.”²⁰ As Karlan tells it, “[W]e were exhausted. But we were all looking forward to the typical ultra-casual, ultra-Reform Seder: the four questions, the four sons, the 10 plagues, some matzoh ball soup and a relaxing dinner.”²¹ However, when the Justice knocked on the door wearing a yarmulke and holding a Haggadah bristling with slips of paper and marginal notes, the young clerks resigned themselves to conducting the entire seder, with no shortcuts. “It was clear he was expecting a full-blown seder—complete with Hebrew. The only thing we managed to skip was the hand-washing. We certainly all finished every last required cup of wine.”²²

In his September 20, 1987 sermon, Blackmun speaks movingly of having visited Israel and gone to the Western Wall, praying and leaving a note written by one of his law clerks whose mother had recently died.

It was an emotional moment, as we stood there, offered a short prayer, and saw others to the right and to the left of us, singly, in pairs, and in groups, from all over the world, doing much the same and participating in the inherent learning and inspiration and strength of the place. I realized then how massively meaningful it was for those people—and for me. And, in a way, I understood why they returned, for they gathered history in their minds, generation

¹⁹ *Id.*

²⁰ Pamela S. Karlan, *Personal Perspective: My Seder with Blackmun; Court Gossip and Matzoh Balls*, L.A. TIMES, Apr. 10, 1994, at M2.

²¹ *Id.*

²² *Id.* The *seder* is the traditional dinner that forms the core of the Jewish celebration of Passover, which commemorates the Hebrews’ deliverance from slavery in Egypt. The *Haggadah* is the text that is read communally during the dinner.

upon generation, and they departed renewed in fortitude and outlook as well as in faith.²³

Thus, we see in Justice Blackmun a man deeply rooted in his own faith and emotionally open to the faith of others.

IV. THE SERMONS

A. “*In Recognition of the Imperfect*”

On September 20, 1987, Justice Blackmun preached a sermon on the occasion of the bicentennial of the Constitution. The sermon begins with Moses’s announcement of the Ten Commandments, followed immediately by Moses’s pointed reminder to the people that God was giving them cities which they did not build, houses which they did not fill, and olive trees which they did not plant.²⁴ Blackmun piles on layered imagery from other parts of the Bible, including the *Book of Joshua*, *Ecclesiastes*, and the *Gospel of John* (“one sows and another reaps”), all highlighting what the Justice perceives as three themes: “(1) our indebtedness to those who have gone before; (2) our being the beneficiaries of their, not our own, wisdom and efforts; and (3) our indebtedness to God, for wisdom itself is a part of God’s creation and beneficence.”²⁵ The sermon continues by noting the anniversary of the signing of the Constitution, and then poses two questions: *Why do we care about this anniversary?* and *Why do we take time in a Sunday worship to note this secular event?*²⁶

Noting that “we still struggle to ascertain the depths of the instrument’s meaning,” Blackmun paraphrases Bill Moyers by saying that we are “constantly . . . [i]n Search of the Constitution.”²⁷ The sermon then focuses on the Constitution’s “defects,” as seen two hundred years later.²⁸ According to the Justice, the primary defects are slavery, the “nonenfranchisement of women” and the exclusion of American Indians.²⁹ He asks again, rephrasing his questions to take into

²³ Harry A. Blackmun, Sermon: “In Recognition of the Imperfect” 10 (Sept. 20, 1987) [hereinafter 1987 Sermon] (unpublished sermon, transcript on file with the Library of Congress).

²⁴ *Id.* at 1.

²⁵ *Id.* at 2-3.

²⁶ *Id.* at 3.

²⁷ *Id.* at 4.

²⁸ *Id.*

²⁹ 1987 Sermon, *supra* note 23, at 5-6.

account these Constitutional “defects”: *Why are we so enthusiastic about a document with such obvious imperfections? and Why do we take time in “the only hour we set aside for formal worship,” to consider this secular document?*³⁰

The Justice suggests five responses to these questions. First, the Bible and the Constitution each provide “roots.” The Constitution provides “the roots for our living together and getting along together in a reasonably passable way in this Nation,” and “in a manner that . . . is fair, equitable [and] principled.”³¹ In other words, it provides the roots for “our day-to-day political existence.”³² The Bible, which Blackmun terms “this great Book,” provides the “worthwhile and living roots of our Judeo-Christian heritage and faith.”³³

Second, Blackmun suggests, rather cautiously, that some of the “great truths” of Scripture, such as “freedom, equality, due process, [and] equal protection” appear to be reflected in the Constitution.³⁴ “Do we presume too much when we suggest the one perhaps was partly inspired by the other?”³⁵

Third, “[k]nowledge is power” and exposing and correcting the imperfections of the Constitution is neither “improper [n]or wrong.”³⁶ Although no one can know definitively which Constitutional interpretation is correct, “we must try and try again in our attempts to guide constitutional law toward perfection.”³⁷ Here Blackmun offers another parallel: even “the greater Book” is not perfect. The “eye-for-an-eye mentality,” he notes, is no longer considered “moral.”³⁸ Fourth, from imperfection comes “tolerance and compassion” for different paths to seeking a way of life that benefits all.³⁹

³⁰ *Id.* at 6-7.

³¹ *Id.* at 11.

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 11-12

³⁵ 1987 Sermon, *supra* note 23, at 12 (referring to a combination of the typescript and handwritten emendations). The typescript originally read: “Do we presume too much when we suggest the one was inspired by the other?” The word “one” is crossed out and a penciled emendation substitutes “perhaps was partly.”

³⁶ *Id.*

³⁷ *Id.* at 14

³⁸ *Id.*

³⁹ *Id.* at 15.

Finally, from imperfection comes the challenge to “strive for the better.”⁴⁰ Justice Blackmun describes that striving as holding on to what has been achieved “on the way to equality and . . . true justice” and to accepting the challenge of eliminating “bias and prejudice and bigotry and selfishness and greed.”⁴¹ The struggle against the imperfect, he goes on, has not been won and will not be won in our lifetime. “But we *can* press forward steadily, continuously, unceasingly, pushing back the frontiers of the imperfect and the unfair.”⁴² The sermon concludes by returning to the theme of the current generation as the beneficiaries of those who preceded us:

We drink of a well we did not dig. Our so-called “Founding Fathers” dug it for us, and they in turn rested on prior-established truths taught by the wisdom of centuries past. And we are justified in singing the praises of those famous personages who brought to us, in this brief document, a way of life that was untried, but so full of promise, a way of life that must have been inspired and of God’s creation.

Because that is so, something positive is expected of us as we stride confidently into the Third Century of the Constitution’s firm anchorage.⁴³

B. “Mother’s Day”

Dr. Holmes no longer remembers why he asked Justice Blackmun to preach on Mother’s Day, May 10, 1992.⁴⁴ But having accepted the assignment, the Justice made some interesting choices.

The typewritten text of the speech is preceded by a handwritten page, presumably added in the week preceding the Sunday on which Blackmun was to preach. In this emendation, the Justice notes the “wretched events that took place in L.A. on April 29th,”⁴⁵ an obvious reference to the acquittal of the men accused of beating Rodney King, and the

⁴⁰ *Id.* at 16.

⁴¹ 1987 Sermon, *supra* note 23, at 16.

⁴² *Id.* at 18 (emphasis added).

⁴³ *Id.* at 19.

⁴⁴ Holmes Interview, *supra* note 16.

⁴⁵ Harry A. Blackmun, Sermon: “Mother’s Day” (May 10, 1992) [hereinafter 1992 Sermon] (unpublished sermon, transcript on file with the Library of Congress). Note that this is the unnumbered page of handwritten text that precedes the actual sermon.

subsequent riots.⁴⁶ He comments that it seems as if “the entire world” is in turmoil, and asks if we can possibly rise above “man’s inherent cruelty to man.”⁴⁷ He answers himself in the next paragraph, writing that “we must . . . see to it that the flowering of the new life somehow—somehow—will rise, as it always has, from the ashes of old disasters.”⁴⁸

The Justice begins, as “a preliminary but necessary comment,” by recalling the words of Jesus on the cross, as he commended his mother to the care of his disciple.⁴⁹ He follows this with a general discussion of motherhood and with a short history of Mother’s Day in the United States.⁵⁰ The next section deals with “womanhood generally,” in which he names some influential women throughout history and concludes that “[w]omen have been influential despite the odds.”⁵¹

The sermon now turns more specifically to Scripture. Blackmun notes generally the importance of parents and the commandment to honor both the father and the mother. He then mentions two women, Mary the mother of Jesus, and Mary Magdalene, simply commenting that he will not discuss them “today.”⁵² With preliminaries over, he introduces the *Book of Ruth*, which he characterizes as “a classic example of loyalty and devotion of one person to another.”⁵³ The next third of the text retells the story of the *Book of Ruth* in a straightforward manner, with no interpretation or commentary.⁵⁴

⁴⁶ Marc Lacey & Shawn Hubler, *Rioters Set Fires, Loot Stores; 4 Reported Dead; Rampage: 106 Are Wounded or Injured and More than 150 Blazes Are Ignited. Bradley Considers a Curfew*, L.A. TIMES, Apr. 30, 1992, at A1.

⁴⁷ 1992 Sermon, *supra* note 45.

⁴⁸ *Id.*

⁴⁹ *Id.* at 1. Note that this is the first typed page, preceded by a title page and by an unnumbered page of handwritten text.

⁵⁰ *Id.* at 1-5.

⁵¹ *Id.* at 6-7. Pamela Karlan notes that Blackmun was the first Justice to hire three female clerks in the same term (1985); by the time he had retired, Blackmun had hired more female clerks than any other Justice. Pamela S. Karlan, *A Tribute to Justice Harry A. Blackmun*, 108 HARV. L. REV. 13, 18-19 (1994).

⁵² 1992 Sermon, *supra* note 45, at 8.

⁵³ *Id.* at 9.

⁵⁴ *Id.* at 9-15. The Justice’s one brief commentary explains the custom of Levirate marriage, wherein Boaz, as a kinsman of Naomi and therefore of Ruth’s dead husband, has the right to buy not only the family’s land, but also to marry Ruth and to raise up a child who will be considered a child of Elimelech. *Id.* at 12.

The *Book of Ruth* is in the Hebrew Bible (or “Old Testament”) immediately after the *Book of Judges*. Naomi and Elimelech had left Judah because of a famine, going to Moab with their two sons.⁵⁵ Elimelech died in Moab, as did the sons, who had married alien Moabite women but without issue.⁵⁶ Naomi, destitute and bereft of family, decided to return to Judah.⁵⁷ She told her daughters-in-law, Orpah and Ruth, to remain in Moab and remarry.⁵⁸ Orpah obeyed her, but Ruth insisted on following Naomi, vowing that she would adopt Naomi’s life, land, religion, people, and fortunes.⁵⁹ They arrived in Judah in time for the harvest, and Ruth took advantage of the privilege of “gleaning” that the law granted to the poor.⁶⁰ She chose to glean in fields owned by Boaz, a rich kinsman of Naomi.⁶¹ Urged on by Naomi, she brought herself to Boaz’s attention, laid down by his feet at night in the threshing barn, and caused him to propose marriage.⁶²

After recounting the story of *The Book of Ruth*, this part of the sermon ends by pointing out that Ruth and Boaz’s son, Obed, became the father of Jesse, and therefore the grandfather of King David. “With this, a fact of interest emerges. For it is a foreigner, Ruth, who becomes an ancestor of David and through him, for Christians, of Joseph, the husband of Mary, the Mother of Christ.”⁶³

Blackmun notes that the “usual” focus of the *Book* is on Ruth’s loyalty, for which “[w]e naturally admire her.”⁶⁴ What, he asks, can we learn from this story for Mother’s Day?⁶⁵ He “venture[s] to suggest” eight points.⁶⁶

The first point that teaches us about Mother’s Day focuses on Naomi, who symbolizes for Blackmun the “importance and strength” of the women in our lives.⁶⁷ Naomi was strong and triumphed despite being widowed and childless

⁵⁵ *Ruth* 1:1-2.

⁵⁶ *Id.* at 1:4-5.

⁵⁷ *Id.* at 1:6-7.

⁵⁸ *Id.* at 1:8-9.

⁵⁹ *Id.* at 1:15-16.

⁶⁰ *Id.* at 2:2.

⁶¹ *Ruth* 2:2-3.

⁶² *Id.* at 3:1-4:12.

⁶³ 1992 Sermon, *supra* note 45, at 15.

⁶⁴ *Id.* at 16.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

in a strange land.⁶⁸ The second point focuses on Ruth, and on her “tenacity” and courage in choosing to go with Naomi to a strange and hostile land.⁶⁹ “The young woman from Moab shows us the way.”⁷⁰

In the third point, Blackmun moves from the individual women to the people of Judah, who did not cast out this strange woman who came from a different land, culture, and religion.⁷¹ In fact, with her marriage to Boaz, Ruth became one of them. The Justice asks, “Can we match this example of the welcoming arms?” and ties this question to the poem inscribed on the Statue of Liberty and to the current problem of illegal immigrants from Mexico.⁷² The fourth point seems to stand in contradistinction or perhaps in balance to the third, as Blackmun extols what he terms “[t]he example of utter loyalty to one’s own.”⁷³ What the Justice means by “one’s own” is not obvious here, as he immediately concedes that Naomi was neither Ruth’s mother nor her kin. Ruth, therefore, “provides us with an even harder example.”⁷⁴ Perhaps the point is that, once having chosen Naomi as “her own,” Ruth’s loyalty was unswerving and unconditional.⁷⁵

The fifth point that teaches us about Mother’s Day is about “[a]cceptance and [i]nvolvement.”⁷⁶ The Justice describes how Ruth, once she made her decision, plunged into her life in Judah and made the most of it. He inquires, “Do we participate in the several missions of life of the Church and do we do what we can to advance them?”⁷⁷ The sixth point addresses “[t]he reordering of our priorities and the recognition of our real status.”⁷⁸ Here, Blackmun quotes at length a poem

⁶⁸ *Id.*

⁶⁹ 1992 Sermon, *supra* note 45, at 16.

⁷⁰ *Id.* at 17.

⁷¹ *Id.*

⁷² *Id.* at 17-18.

⁷³ *Id.* at 18.

⁷⁴ *Id.*

⁷⁵ Blackmun also writes that Ruth’s “complete loyalty” was based on a number of factors, including “tradition.” 1992 Sermon, *supra* note 45, at 18. In this he seems incorrect, as a recurring theme of the story, one Blackmun himself emphasizes, is that Ruth is making a nontraditional and therefore risky and courageous choice in following Naomi to a strange land.

⁷⁶ *Id.* at 19.

⁷⁷ *Id.*

⁷⁸ *Id.*

attributed to a Confederate soldier, to the effect that God gives us not what we think we need, but what we really need.⁷⁹

The seventh point is “[t]he blight of continued racism and misery in our society.”⁸⁰ Next to this paragraph the Justice has written a note, “L.A. cases,” in obvious reference to the Rodney King beating and subsequent disturbances. The eighth and final point concerns “[o]ur capability for a change in direction.”⁸¹ To illustrate this point, the Justice tells the inspiring story of John Newton, an English slave trader who “changed direction,” entered the ministry and became an abolitionist.⁸² Newton is the author of such “familiar” hymns as “Amazing Grace.”⁸³

Blackmun concludes by saying that “it all comes down finally to . . . Love.”⁸⁴ He connects Mother’s Day, which honors the figure who “most represents” love, with the steadfast love exhibited by Ruth.⁸⁵ If we try to show that same love in our lives, then perhaps we too “in our small way can be part of the lineage of David.”⁸⁶ If our love is as loyal and active as Ruth’s, then we too, says Blackmun, can “mean more than seven sons,” as was said in the Bible about Ruth.⁸⁷ Blackmun notes that “[i]n that day, 500 years before Christ, [being more than seven sons] was a mighty tribute.”⁸⁸ The sermon ends by asking, “Are we up to it?”⁸⁹

1. *Ruth* is About Women

The *Book of Ruth* is an unusual choice for a Mother’s Day sermon. Even having decided not to “presume” to discuss Mary,⁹⁰ the Justice had a choice of many women in the Bible who are strongly identified by their maternal role. One thinks of Sarah, who bore Isaac in her old age, or Rachel, who cried,

⁷⁹ *Id.* at 19-20.

⁸⁰ *Id.* at 20.

⁸¹ 1992 Sermon, *supra* note 45, at 20.

⁸² *Id.* at 21.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* at 22. The next sentence, around which the Justice has inked brackets, reads “[a]nd that, in its strange way, was the lineage of Christ.” *Id.*

⁸⁷ 1992 Sermon, *supra* note 45, at 22.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* at 8.

“Give me children or I will die!”⁹¹ Instead, Blackmun chose to focus on Ruth, whose maternal role was so spare that one commentator concluded that Ruth had no desire for children.⁹² Although the “punch line” of the story, as we saw, does depend on Ruth and Boaz having a child, Ruth was clearly identified as a daughter-in-law, not as a mother. Her primary relationship throughout the story was with her mother-in-law Naomi. When Obed was born, Ruth handed him over to Naomi, who nursed him. “And the women her neighbors gave it a name saying, There is a son born to Naomi!”⁹³

In this light, it is interesting to note that the list of “influential women” that Blackmun lists toward the beginning of the sermon are mostly not mothers (e.g., Elizabeth I, Cleopatra, Joan of Arc) or not known for their motherhood. However conventionally the Justice begins, with an evocation of our own childhood memories of mothers,⁹⁴ the focus of his address is *women*, not *mothers*.

All the important actors in the *Book of Ruth* are women. Naomi’s husband and sons died in the first few paragraphs. Boaz’s role was primarily reactive, and one rabbinic midrash⁹⁵ had Boaz die immediately after the conception of his son.⁹⁶ Further, the crucial female relationship in the story is one of love, loyalty, and shared goals. This is in sharp contrast to the common depiction of intimate female relationships in the Bible, which are difficult and problematic, as “women (e.g., Sarah and Hagar, Rachel and Leah) . . . compete for the scarce prize of a relationship with a man.”⁹⁷

Ruth is “*the* women’s book of the Hebrew Bible,”⁹⁸ written either by a woman herself, as some scholars have assayed, or, if not, certainly by “a man who saw women’s interests and took them seriously.”⁹⁹ It is hard to think of a

⁹¹ *Genesis* 30:1.

⁹² Gail Twersky Reimer, *Her Mother’s House*, in *READING RUTH: CONTEMPORARY WOMEN RECLAIM A SACRED STORY* 97, 104 (Judith A. Kates & Gail Twersky Reimer eds., 1994) [hereinafter *READING RUTH*].

⁹³ *Ruth* 4:13.

⁹⁴ 1992 Sermon, *supra* note 45, at 1-5.

⁹⁵ A *midrash* is an exegetical commentary upon Hebrew scripture.

⁹⁶ LAURIE ZOLOTH, *HEALTH CARE AND THE ETHICS OF ENCOUNTER: A JEWISH DISCUSSION OF SOCIAL JUSTICE* 216 (1999).

⁹⁷ *Id.* at 199.

⁹⁸ Irmtraud Fischer, *The Book of Ruth: A ‘Feminist’ Commentary to the Torah?*, in *RUTH AND ESTHER: A FEMINIST COMPANION TO THE BIBLE* 24 (Athalya Brenner ed., Second Series 1999) [hereinafter *RUTH AND ESTHER*].

⁹⁹ *Id.* at 34.

better description of Justice Blackmun himself. Ruth, after all, was someone who made a choice layered with meaning, a choice that would turn almost every compass point of her life upside down. She refused to do the conventional thing and return to her mother's house, as Naomi urged her. She chose to follow her mother-in-law to a strange land, to adopt a strange God, to give up (as Naomi warned her) the likelihood of marriage and children. The choice Ruth faced when she stood with Naomi and Orpah at the crossroads was one only she could make for herself. Blackmun showed that he understood these kinds of choices when he wrote:

Our cases long have recognized that the Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government. That promise extends to women as well as to men.¹⁰⁰

2. *Ruth* is About Social Justice

The *Book of Ruth* is a favorite text of scholars arguing for social justice and equality. *Ruth* has been enlisted in many causes, including acceptance for lesbians and gays,¹⁰¹ guaranteed minimum health care,¹⁰² justice for foreign guest workers,¹⁰³ and welfare reform.¹⁰⁴

More specifically, *Ruth* is about justice towards an alien, an outsider to the community. Not only was Ruth not from Judah, but worse than that—she was a Moabite! Moabites were considered the absolute *other* and were reviled by the Israelites for a number of reasons. First, their origin was considered disgusting and illicit: they are the descendents of the incestuous union of Lot and his daughters.¹⁰⁵ Second, Moabite women, in the past, had seduced Hebrew men into worshipping idols. Ruth thus “signifies the enemy, the pagan, and the forbidden sexual liaison.”¹⁰⁶ Finally, and perhaps most importantly, the Moabites were reviled for their refusal of

¹⁰⁰ *Thornburgh v. Am. Coll. of Obstetricians and Gynecologists*, 476 U.S. 747, 772 (1986).

¹⁰¹ Rebecca Alpert, *Finding Our Past: A Lesbian Interpretation of the Book of Ruth*, in *READING RUTH*, *supra* note 92, at 91.

¹⁰² *ZOLOTH*, *supra* note 96.

¹⁰³ Athalya Brenner, *Ruth as a Foreign Worker and the Politics of Exogamy*, in *RUTH AND ESTHER*, *supra* note 98, at 158.

¹⁰⁴ Jeffrey Dekro, *Welfare Reform and the Book of Ruth*, 14 *TIKKUN* 80 (1999) (“The Book of Ruth is most essentially about women living in poverty.”).

¹⁰⁵ *Genesis* 19:30-38.

¹⁰⁶ *ZOLOTH*, *supra* note 96, at 211.

compassion and charity. They exemplified complete lack of *chesed*—loving-kindness.¹⁰⁷ Because “they did not meet you with food and water on your journey after you left Egypt, and because they hired Balaam . . . to curse you,”¹⁰⁸ no Moabite had ever been admitted into the community. Cynthia Ozick comments, “An abyss of memory and hurt in that: to have passed through the furnace of the desert famished, parched, and to be chased after by a wonder-worker on an ass hurling the king’s maledictions, officially designed to wipe out the straggling mob of exhausted refugees!”¹⁰⁹

The *Book of Ruth*, however, completely upends the notion of who is alien and who belongs to the community. Even before we meet the heroine of the story, we are told that Elimelech, with his wife Naomi and his two sons, left Bethlehem-Judah in a time of famine, and went to Moab. The triple tragedy that befell them there—the deaths of all but Naomi—is usually understood to be a punishment. But punishment for what? Both rabbinic and contemporary commentators interpret Elimelech’s transgression to be his desertion of his community in time of need. A rabbinic source comments that Elimelech was “a great and noble man” who could have and should have fed the whole community. Instead, as soon as the famine began, he feared that everyone would come to him seeking help, so he left.¹¹⁰ In today’s nomenclature, Elimelech is characterized as “the prudent libertarian,”¹¹¹ an example of “stinginess” and “sterile individualism.”¹¹² Thus, the story began with someone who should have been a pillar of the community, but who voluntarily exiled himself, not only in the geographic sense, but in the sense of his refusal to exhibit the all-important quality of

¹⁰⁷ YITZHAK I. BROCH, *THE BOOK OF RUTH: AS REFLECTED IN RABBINICAL LITERATURE* (1975). “*Ruth* has traditionally been called the book of *chesed*, a word usually translated as lovingkindness or benevolence. It refers to acts of care and love that go beyond obligation and to a quality of generosity, of an abundance in giving. The Bible attributes this quality most particularly to God.” Judith A. Kates, *Women at the Center: Ruth and Shavuot*, in *READING RUTH*, *supra* note 92, at 187, 190.

¹⁰⁸ *Deuteronomy* 23:4-5.

¹⁰⁹ Cynthia Ozick, *Ruth*, in *READING RUTH*, *supra* note 92, at 211, 215.

¹¹⁰ BROCH, *supra* note 107, at 11-12.

¹¹¹ ZOLOTH, *supra* note 96, at 204.

¹¹² Avivah Zornberg, *The Concealed Alternative*, in *READING RUTH*, *supra* note 92, at 65, 71.

chesed.¹¹³ Ruth, by contrast, the despised alien, exhibited *chesed* in truly heroic proportions. She gave up everything to follow Naomi to a strange land (a land of her historic enemies, where she could hardly expect a warm welcome) and once there she took every effort in ensuring the older woman's survival. The result of her courage and loyalty was marriage into the community and a son who put her directly in the lineage of David (and, from a Christian perspective, of Jesus).

The point could not have been made stronger. Not only could a foreigner be assimilated into Judaism and prove a worthy addition to it, but the foreigner might be the source of the highest good. . . . To Christians, the importance went even further. Through David, Ruth was the ancestress of Jesus, and therefore the tale tends to reinforce the Christian view of the Messiah: that he is for all mankind and not for the Jews alone.¹¹⁴

A common interpretation of the *Book of Ruth* is that it is a story that decries the strictures against intermarriage with foreigners. Asimov, for example, noted that the book was written at the time when the Jews were returning from exile and were seeking to purify and reclaim the land that had been settled in their absence by foreigners.¹¹⁵ Thus, the leaders had instituted a "rigid and narrow racial policy" against marrying foreigners.¹¹⁶ Asimov claims that the author of *Ruth* was a Jew who was "appalled" at this "heartless[]" and "pett[y]" policy.¹¹⁷ He or she wrote the *Book of Ruth* "as a clarion call for universality and for the recognition of the essential brotherhood of man."¹¹⁸

The *Book of Ruth* is widely known to both Jews and Christians and has "the cultural resonance" of the Good Samaritan story.¹¹⁹ In fact, Ruth's story is akin to the story of the Good Samaritan, but told from the perspective of the man who was beset by thieves. In the *Gospel of Luke*, a lawyer

¹¹³ *But see* ISRAEL BETTAN, THE JEWISH COMMENTARY FOR BIBLE READERS: THE FIVE SCROLLS 57 (1950) (disagreeing with the view that Elimelech had erred by leaving Judah in a time of famine).

¹¹⁴ ISAAC ASIMOV, ASIMOV'S GUIDE TO THE BIBLE: VOLUME ONE, THE OLD TESTAMENT 265-66 (1968).

¹¹⁵ *Id.* at 265.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.* *But see Book of Ruth*, in 14 ENCYCLOPAEDIA JUDAICA 519, 520 (1972) (asserting that "[t]he opinion that the book was written as a protest against the Ezra-Nehemiah attitude toward foreign women has no basis at all." (citation omitted)).

¹¹⁹ ZOLOTH, *supra* note 96, at 198.

asked Jesus what he should do to inherit eternal life. Jesus responded with the basic Jewish dyad: love God and love your neighbor as yourself. But the lawyer, “seeking to justify himself,” (that is, seeking to show himself more clever and versed in the law than Jesus) asked, “Who is my neighbor?” Jesus responded with a parable. He told the story of a man, a traveler, who was beset by thieves; they robbed him, wounded him, stole his clothes and left him half dead. First a priest and then a Levite came down the road, saw the wounded man, and crossed to the other side. Finally, a Samaritan who was journeying on the road saw the man, had compassion on him, and took care of him. He not only bound up his wounds and conveyed him on the Samaritan’s own horse, but he settled him at an inn and guaranteed his expenses. Jesus then asked the lawyer which of these three was “the neighbor” to the unfortunate victim. The lawyer responded that it was “he who showed mercy on him.” To which Jesus said, “Go and do likewise.”¹²⁰

Ruth is like the wounded man in the parable. She is a hungry stranger who arrives in Bethlehem-Judah. “In Ruth,” says Justice Blackmun, “these people found in their midst a stranger . . . Yet the people did not cast her out.”¹²¹ The parallel goes deeper than that. As we saw, Ruth is not just any stranger; she is from the despised race of Moabites. In the *Book of Ruth*, she is relentlessly identified as “Ruth the Moabitess.” It is Ruth’s Moabite identity that gives real bite to the story. In the same fashion, the Samaritan is not just any stranger, to be contrasted with the priest and Levite (who would be in the innermost, holiest circles of Jewish society). He is a member of a group which, from the lawyer’s perspective, was both perverse and heretical.¹²² Jews hated and despised Samaritans because the latter accepted only the Pentateuch¹²³ as canonical (and their own version at that), rejecting the later writings as well as the oral tradition. A negative view of Samaritans is found in the Hebrew Bible, the New Testament, the writings of historian Josephus, and

¹²⁰ *Luke* 10:25-37.

¹²¹ 1992 Sermon, *supra* note 45, at 17.

¹²² David L. Barr, *How Ironic—A Samaritan!*, in THE NEW MEDIA BIBLE: THE GOOD SAMARITAN, <http://www.newmediabible.org/1goodsam/travel/01genbckgrnd/lukegsam/articles/article1ironylukestrygsam.htm> (last visited Oct. 12, 2006).

¹²³ The first five books of the Hebrew Bible, sometimes referred to as “Torah.”

rabbinic writings.¹²⁴ In short, Luke's audience was well aware of the irony of the Samaritan being held up as the moral exemplar.

Ruth the stranger is both the victim in need of help, and—in her loyalty to Naomi—the despised alien who manifests the ethical ideal. Her story and that of the Samaritan both carry the same twinned message: first, that it is a mark of justice for a community to welcome the alien into their midst, and, second, that the alien herself may prove to be more filled with loving kindness than those who would look down on her. For the Methodist audience to which Blackmun preached, Ruth is a fresh way of ruminating upon some of the same themes that are perhaps overly familiar in the story of the Good Samaritan. The Justice asks, “Can we match this example of [open arms]? . . . What of the plight of today's refugees from Haiti? What of the persons who persist in breaching our southern border?”¹²⁵

Commentators on the *Book of Ruth* rarely fail to address the interesting question of why *Ruth* is read aloud in synagogues on *Shavuot*, the festival that celebrates the giving of the Law at Sinai to the Jewish people.¹²⁶ The answer is one that Justice Blackmun would have heartily endorsed: *Ruth* is read on *Shavuot* to show that love and compassion are inextricably entwined with the Law.

If we understand Torah, the gift of God “who brought you out of the land of Egypt,” as directed centrally to the sustenance and liberation from suffering of the *ger*, *yatom*, *vealmana*—“the stranger, the orphan, and the widow”—then the *Book of Ruth*, the protagonists of which embody all those vulnerable figures, speaks to the essence of Torah. Its women characters challenge the Jewish world to live up to Torah ideals and, in so doing, make manifest to us what sort of society—what sort of people—Torah is supposed to create.¹²⁷

Not only are the protagonists exemplars of the most vulnerable, they are also exemplars of what it means to fulfill the commandments, to act in the spirit of the Law.

¹²⁴ Adele Reinhartz, *The Samaritans—Then and Now*, in THE NEW MEDIA BIBLE: THE GOOD SAMARITAN, *supra* note 122, <http://www.newmediabible.org/1goodsam/travel/05luke1033/articles/article5samaritans.htm> (last visited Oct. 12, 2006).

¹²⁵ 1992 Sermon, *supra* note 45, at 17-18.

¹²⁶ *E.g.*, Kates, *supra* note 107, at 188-98.

¹²⁷ Judith A. Kates & Gale Twersky Reimer, *Introduction*, in READING RUTH, *supra* note 92, at xvii, xix.

The Book of Ruth fully enacts the ideals of Torah. Its characters fulfill their legal and moral obligations under Torah Without Torah law, mere impulses of kindness or pleasure would offer only ephemeral help. But the ideal of Torah encompasses more than a minimal response to the law's requirements. The rich development of the theme of *chesed* throughout the book embodies a vision of fulfillment of *mitzvot* (commandments) in a spirit of lovingkindness, of generosity, of actively reaching out to the most vulnerable and bereft. This ideal is finally enacted by means of the courage of two women, Ruth and Naomi.¹²⁸

Protection of the rights of aliens and outsiders was a hallmark of Justice Blackmun's career on the Court.¹²⁹ He was acutely aware of "another world 'out there'"¹³⁰ in which people were not as fortunate as he. Pamela Karlan, writing in 1995, said, "No Justice sitting on the Court today, and few in its history, did more to sear the conscience of the people, or his or her Brethren, with the plight of the 'unfortunate denizens of that world, often frightened and forlorn.'"¹³¹ Harold Koh called Blackmun "the spokesman for the have-nots, the excluded, the discrete and insular minorities."¹³²

Prisoners are perhaps the most isolated and extreme "outsiders" in our society. Ms. Karlan showed how Blackmun found within himself the capacity to empathize with prisoners, going so far as to subscribe to a prison newspaper, the Stillwater Minnesota *Prison Mirror*.¹³³ Blackmun was no revolutionary. He did not wish to tear down all prisons, nor to demolish the nuclear family. But he did see that the real world often failed to conform to its idealized version, and he was scathing toward his fellow Justices who indulged in "pious pronouncements fit for an ideal world,"¹³⁴ rather than facing up to the appalling conditions of many American prisons. Justice Blackmun was equally scathing toward his fellow Justices who made "placid reference" to ideal parents giving "compassionate"

¹²⁸ Kates, *supra* note 107, at 197.

¹²⁹ See Pamela S. Karlan, *Bringing Compassion into the Province of Judging: Justice Blackmun and the Outsiders*, 71 N.D. L. REV. 173, 178-9 (1995); Harold Hongju Koh, *Equality with a Human Face: Justice Blackmun and the Equal Protection of Aliens*, 8 HAMLINE L. REV. 51, 52-53 (1985).

¹³⁰ *Beal v. Doe*, 432 U.S. 438, 463 (1977) (Blackmun, J., dissenting).

¹³¹ Karlan, *supra* note 129, at 173.

¹³² Harold Hongju Koh, *Justice Blackmun and the "World Out There,"* 104 YALE L.J. 23, 23 (1994).

¹³³ Karlan, *supra* note 129, at 177.

¹³⁴ *United States v. Bailey*, 444 U.S. 394, 420 (1980) (Blackmun, J., dissenting).

advice to pregnant minors,¹³⁵ rather than understanding that some of those minors may be more terrified of abusive parents than of the abortion procedure itself.

Another example of Blackmun's jurisprudence of compassion was in cases addressing the rights of aliens in the United States. The first in the line of cases that articulated the equal protection analysis of the rights of resident aliens was *Graham v. Richardson*,¹³⁶ in 1971. *Graham* involved lawfully admitted resident aliens who were barred from receiving welfare benefits in two states, either until they obtained American citizenship or until they fulfilled a burdensome residency requirement. Applying equal protection theory, Blackmun wrote for the Court that aliens were a suspect class entitled to heightened scrutiny, and that the states' concerns for balancing their budgets and preserving welfare benefits for their citizens were not sufficiently compelling to justify discrimination against aliens.¹³⁷

It is hard to imagine a Court case more like the story of Ruth. Ruth the alien arrived in Bethlehem-Judah unknown and starving. To survive, she had to take advantage of the community's law that farmers "not reap all the way to the edges of your field, or gather the gleanings of your harvest . . . you shall leave them for the poor and *the stranger*."¹³⁸ Had she been forced to wait until achieving the equivalent of citizenship (presumably by marrying Boaz) or required to fulfill a residency requirement, she quite probably would have died. Jeffrey Dekro comments, "When Ruth goes out to glean grain in the fields of her mother-in-law's people, she does so with a sense of dignity and entitlement," because of the biblical mandate.¹³⁹

In choosing to speak about the *Book of Ruth* in his sermon at MMUC, Justice Blackmun preached ideas that were utterly consistent with his jurisprudence. As Dr. Holmes said at the Justice's funeral, Blackmun's theory of Constitutional interpretation and his theory of biblical interpretation rested on the same foundation of "compassion."

¹³⁵ *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 537 (1990) (Blackmun, J., dissenting).

¹³⁶ 403 U.S. 365 (1971).

¹³⁷ *Id.*

¹³⁸ *Leviticus* 19:9-10 (emphasis added).

¹³⁹ Dekro, *supra* note 104, at 80.

V. THE *DESHANEY* CASE

How do these two sermons, “In Recognition of the Imperfect” and “Mother’s Day,” tie together and how do they express Justice Blackmun’s deepest jurisprudential commitments? A good way of answering that question is to look at one of the Justice’s most famous opinions, his dissent in *DeShaney v. Winnebago County Department of Social Services*.¹⁴⁰

Joshua DeShaney, born 1979, lived with his father, who abused him repeatedly. When Joshua was four years old, his father beat him so badly that he ended up irrevocably brain-damaged and destined to live out his life in an institution.¹⁴¹ During this time, the Winnebago County Department of Social Services (“DSS”) in the State of Wisconsin had repeatedly been made aware of the danger to Joshua.¹⁴² For example, DeShaney’s second wife, on the occasion of their divorce, complained to police that her husband hit the boy. Furthermore, Joshua was three times admitted to a local hospital with suspicious injuries that caused the examining physician to notify DSS.¹⁴³ Various plans were made with Joshua’s father to remedy the situation, but despite the fact that the plans were not carried out and that the home was visited nearly twenty times by DSS social workers, Joshua was never removed from the home.¹⁴⁴ When Joshua’s social worker was informed of the boy’s final beating and resulting injuries, her reaction was: “I just knew the phone would ring someday and Joshua would be dead.”¹⁴⁵

Joshua’s mother sued DSS under the Due Process Clause of the Fourteenth Amendment, claiming that the State had deprived Joshua of his liberty interest in freedom from unjustified intrusions on personal security by failing to protect him from his father’s violence.¹⁴⁶ She argued that the State of Wisconsin had a “special relationship” with Joshua that obligated the state to protect him.¹⁴⁷ The Supreme Court, in an

¹⁴⁰ 489 U.S. 189 (1989).

¹⁴¹ *Id.* at 193.

¹⁴² *Id.* at 192.

¹⁴³ *Id.* at 192-93.

¹⁴⁴ *Id.* at 209 (Brennan, J., dissenting).

¹⁴⁵ *Id.* (citing *DeShaney v. Winebago County Dep’t of Soc. Servs.*, 812 F.2d 298, 300 (7th Cir. 1987)).

¹⁴⁶ *DeShaney*, 489 U.S. at 196 (majority opinion).

¹⁴⁷ *Id.* at 197.

opinion authored by Justice Rehnquist, declined to find that the State had a duty to Joshua. Noting that the facts were “undeniably tragic,” the majority pointed out that the harm inflicted on Joshua came not from the State of Wisconsin but from Mr. DeShaney.¹⁴⁸ While the State “may have been aware” of the dangers Joshua faced, it did not create those dangers, nor did it act in any way that made Joshua more vulnerable to them.¹⁴⁹ “The most that can be said of the state functionaries in this case is that they stood by and did nothing when suspicious circumstances dictated a more active role for them.”¹⁵⁰

Justice Blackmun, along with Justice Marshall, joined in Justice Brennan’s dissent.¹⁵¹ Brennan told the story in a different way, from a different perspective. His dissent focused on the actions that Wisconsin *had* taken with respect to Joshua, not on what it had omitted to do.¹⁵² From that perspective, it appeared to the dissent that Wisconsin had taken control of Joshua’s life in crucial ways that gave rise to a duty to protect him.¹⁵³ Wisconsin law, for example, channels reports of child abuse to DSS, even if the report is received by the police.¹⁵⁴ When physicians at Joshua’s local hospital first reported suspected child abuse, it was DSS that took the boy into temporary custody and DSS that decided to return him to his father.¹⁵⁵ The dissent declared that “inaction can be every bit as abusive of power as action, . . . oppression can result when the State undertakes a vital duty and then ignores it.”¹⁵⁶

Justice Blackmun’s dissent in *DeShaney* is only four paragraphs long, and makes no legal argument not already expressed in Brennan’s dissent.¹⁵⁷ However, Blackmun gave voice to a passionate and sympathetic *cri de coeur*. “Poor Joshua!” Blackmun’s opening sentence,¹⁵⁸ became one of his most famous lines.¹⁵⁹ Blackmun accused the majority of “sterile

¹⁴⁸ *Id.* at 191.

¹⁴⁹ *Id.* at 201.

¹⁵⁰ *Id.* at 203.

¹⁵¹ *Id.* (Brennan, J., dissenting).

¹⁵² *DeShaney*, 489 U.S. at 205.

¹⁵³ *Id.* at 210.

¹⁵⁴ *Id.* at 208 (citing WIS. STAT. § 48.981(3)(a) (1987)).

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 212.

¹⁵⁷ *Id.* at 212-13 (Blackmun, J., dissenting).

¹⁵⁸ *DeShaney*, 489 U.S. at 213.

¹⁵⁹ Oral History, *supra* note 12, at 397.

formalism,” which blinded it to both the facts of the case and the relevant legal norms.¹⁶⁰ “[F]ormalistic reasoning has no place in the interpretation of the broad and stirring Clauses of the Fourteenth Amendment.”¹⁶¹ In fact, Blackmun argued that those Clauses were designed to combat the “formalistic legal reasoning that infected antebellum jurisprudence,” and went on to accuse the Court of behaving like the antebellum judges who denied relief to fugitive slaves.¹⁶² Blackmun insisted that the question in this case, far from being determined by existing legal doctrine, was in fact, open, and that the precedents may be read more or less broadly, as one chooses. “Faced with the choice, I would adopt a ‘sympathetic’ reading, one which comports with dictates of fundamental justice and recognizes that compassion need not be exiled from the province of judging.”¹⁶³

Justice Blackmun became known and sometimes criticized for the personal and emotional tone of some of his opinions, of which *DeShaney* is perhaps the strongest.¹⁶⁴ Twice in four paragraphs the opinion gave the child’s full name, Joshua DeShaney.¹⁶⁵ It is interesting that the Justice used the term “exile” in the sentence quoted above. The notion of exile—of insiders and outsiders—is never far from the Justice’s thoughts. In his sermon on the bicentennial of the Constitution, he speaks of the imperfections of a social compact that excludes women, African-Americans, and Native Americans. In his sermon on *Ruth*, he constantly plays with themes of exile and welcome; Naomi returns destitute from the exile imposed on her by her husband’s flight from Judah, and she brings with her the Moabitess, the ultimate outsider, who has exiled herself from Moab in order to cleave to Naomi. Everything in the *Book of Ruth* depends on how the community deals with these two vulnerable and powerless outsiders. Little Joshua, too, is vulnerable and powerless, “abandoned” by the State of Wisconsin.¹⁶⁶

¹⁶⁰ *DeShaney*, 489 U.S. at 212 (Blackmun, J., dissenting).

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.* at 213.

¹⁶⁴ Laura Krugman Ray, *Judicial Personality: Rhetoric and Emotion in Supreme Court Opinions*, 59 WASH. & LEE L. REV. 193 (2002).

¹⁶⁵ *DeShaney*, 489 U.S. at 212-13 (Blackmun, J., dissenting).

¹⁶⁶ *Id.* at 213.

In 1995, as part of a series of interviews for the Library of Congress Oral History Project, Blackmun's former law clerk, Harold Koh, asked the Justice about the sympathetic and compassionate reading of the law that he had advocated in *DeShaney*. Blackmun responded: "I have been criticized, of course, for allowing compassion to enter my decision-making more than it should. I think compassion has a role as a factor, not the fundamental factor. I do not withdraw my statements. I'll stick by them."¹⁶⁷

Less noticed than "Poor Joshua!" or the "sympathetic reading" of the Fourteenth Amendment is a stirring quotation in Blackmun's dissent from a book entitled *Law, Psychiatry, and Morality*:

We will make mistakes if we go forward, but doing nothing can be the worst mistake. What is required of us is moral ambition. Until our composite sketch becomes a true portrait of humanity we must live with our uncertainty; we will grope, we will struggle, and our compassion may be our only guide and comfort.¹⁶⁸

VI. CONCLUSION

"Moral ambition" is exactly the thrust of the 1987 sermon, "In Recognition of the Imperfect." As stated above, the Constitutional imperfections about which the Justice is concerned are all exclusions of people who are powerless (slaves, Native Americans) or marginalized (women). Although some of those imperfections have been corrected, we must still acknowledge that, just as the Founding Fathers were not perfect, "[w]e are not perfect."¹⁶⁹ And who can be sure, he asks, whose interpretation is correct? Referencing the same *Dred Scott* Court that he mentioned in *DeShaney*, Blackmun points out that surely Chief Justice Taney and his Brethren thought their interpretation of the Fugitive Slave Act was correct.¹⁷⁰ However, he says, even in the face of this humbling uncertainty, we must "try and try again in our attempts to guide constitutional law toward perfection."¹⁷¹ Even the Bible

¹⁶⁷ Oral History, *supra* note 12, at 397.

¹⁶⁸ *DeShaney*, 489 U.S. at 213 (Blackmun, J., dissenting) (quoting ALAN STONE, *LAW, PSYCHIATRY AND MORALITY* 262 (1984)).

¹⁶⁹ 1987 Sermon, *supra* note 23, at 12.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 14.

is “imperfect,” Blackmun says, and yet “[t]he imperfect surely gives promise for the perfect.”¹⁷²

Justice Blackmun clearly saw it as his job, within the confines of Constitutional jurisprudence, to help to make the Constitution “more perfect.” What that meant, among other things, was to interpret the document as compassionately as possible, and as inclusively as possible. Whether the petitioner was an alien lately come to America, as Ruth to Bethlehem-Judah, or a young child completely dependent on the state for the most basic protections, deciding cases in a way that made the Constitution more responsive to their moral claims was, in the Justice’s eyes, taking the Constitution and therefore our nation, a little further down the road toward perfection.

¹⁷² *Id.* at 15.